11-3440

United States Court of Appeals
for the Third Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

1199 SEIU UNITED HEALTHCARE WORKERS EAST, N.J. REGION,
Intervenor,

v.

NEW VISTA NURSING AND REHABILITATION,
Respondent.

ON REVIEW FROM THE NATIONAL LABOR RELATIONS BOARD

SUPPLEMENTAL BRIEF FOR NEW VISTA NURSING AND REHABILITATION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases *Page(s)*

Statutes/Regulations/Miscellaneous

INTRODUCTION

This Memorandum is filed by New Vista Nursing and Rehabilitation ("New Vista") pursuant to this Court's order of January 21, 2016. That order, *inter alia*, permitted supplemental briefing on "...on issues raised as a result of the remand...". (SA-28) As such, it is respectfully submitted that New Vista reiterates all of the issues raised heretofore before this Court. This memorandum will deal exclusively with issues resulting from the remand. The Court's order limits the memorandum to 10 pages.

THE UTTER LACK OF TRANSPARENCY IN THE REMAND PROCEEDINGS SEVERELY COMPROMISED THEM

As the Court will recall, the Board's General Counsel ("GC") moved this Court for a remand of the disposition of the motions for reconsideration filed in this case. (SA-2) The motion resulted from the Court's questions posed for oral argument that reflected that there was serious question whether they were disposed of by a constitutionally valid quorum of the National Labor Relations Board ("NLRB"). The GC is the "prosecutorial" arm of the agency and the Board is the "judicial" arm deciding the merits of accusatory "complaints" filed against parties by the GC. The NLRB web site states that the NLRB "...acts as a quasi-judicial body ..." while the General Counsel "...is independent from the Board and is responsible for the investigation and prosecution of Unfair Labor Practices...". As noted, the NLRB thus decides on cases "prosecuted" by the GC.

The motion to remand, filed by the GC, sought a remand of up to 30 days. New Vista joined the motion to remand but stated that it should not be limited to 30 days. New Vista noted, *inter alia*, that the September motion for reconsideration was complex enough that it was not decided until the end of December (and the January 23rd motion was decided March 15). Moreover, New Vista advised the Court, and the GC, that it would likely move to recuse Member Hirozawa. (SA-8-9)

Remarkably, the GC replied to this Court that it "...reaffirms its prior representation to the Court that the issues can be resolved within 30 days." Moreover, the reply went on, "...its representation is not affected by New Vista's statement that it will likely seek the recusal of Member Hirozawa on the grounds that he was formerly a partner in the law firm representing the [charging party union] in this matter". (SA-11) Neither this Court, nor New Vista, was aware of what was going on behind the scenes. In fact, this Court, in granting the joint motion to remand the case to the NLRB, on December 4, 2015, refused to limit the remand to 30 days. (SA-13)

The NLRB decided the motions with great alacrity, by denying them all, in less than two weeks, on December 17, 2015. New Vista filed a motion for reconsideration, and to recuse Member Hirozawa, the next day, on December 18, 2015. It was only in deciding, and denying, New Vista's December 18, 2015

motion for reconsideration and for recusal of Member Hirozawa, did New Vista, and likely, this Court, first find out that there was an NLRB "...vote to file the December 2, 2015, motion for limited remand of the administrative record...". (SA-25) Moreover, the NLRB "judicial" arm conflated itself with the GC "prosecutorial" arm in denying the motion for reconsideration and for recusal of December 18, 2015, by stating that "[b]y requesting that the remand be limited to 30 days, the *Board* made clear that it intended to act expeditiously." (SA-23)

Particularly alarming in this regard, is the fact that in response to this Court's January 21, 2016 order for the NLRB to certify and supplement the record to include the "...proceedings on remand", (SA-28) the NLRB's Executive Secretary certified the record with a document docketed January 28, 2015. That document, *for the first time*, lists an heretofore unseen 11/25/15 "General Counsel's Remand Authorization Request" and a 12/2/15 "Board's letter Granting Authorization For the General Counsel to Seek Remand of the Record". Neither this Court, not New Vista were advised before that such documents even exist, let alone their contents. Moreover, the Board's web based docket sheet of this case *still* does not list these documents and New Vista, and this Court, have never seen them. (See 1/28/16 docket entry) The GC removed these entries unilaterally on 2/11/16, in a 2nd certified list, after asserting to counsel that the list's two noted docket entries were a "mistake".

The GC did not advise this Court, or New Vista, that *the Board* had voted to file the remand motion and that it regarded the motion of the GC *as its own*. In effect the NLRB, not the GC, was filing a motion to remand this case from this Court to itself so that it could "decide" it *"de novo"* when it had already likely decided it *(without alerting anyone to what was going on except the GC)*. The Board, apparently, told the GC, and only the GC, *ex parte, at the very least,* that it would decide the three motions for reconsideration within 30 days. It is also very, very likely that there was *ex parte* communication with the GC to enable the GC to state that any motion to recuse Member Hirozawa will not delay the 30 day "window" being sought. Otherwise, how could the GC know that, and be confident enough to "represent" to this Court, there would be no problem meeting the 30 day limit sought even if that meant a motion for Member Hirozawa's recusal? Moreover, there wasn't even an extant motion and yet the GC was advised that the recusal motion would be decided within the 30 day window being sought.

We cannot, of course, know what *else* was shared with the GC because no one has let us in on the goings on. Nor was this Court privy to what was going on behind the scenes. New Vista might not have joined any remand motion had it been aware that its motions for reconsideration and for recusal were going to be given short shrift. This Court might have granted the GC's 30 day limitation had

it been advised that the decision, without any input of the parties, was "in the bag". Worse yet, none of this would have come to light had New Vista not decried the failure to, as is normal in every other case, "accept the remand" and/or seek input from the parties of any change in circumstances, and for the recusal of Member Hirozawa, in yet *another* motion for reconsideration.

Member Hirozawa, we now know, had already participated in the December 2, 2015 NLRB "vote" to bring the remand motion in the first place. Yet even that vote is now compromised because of the *ex parte* communications taking place between the GC and the NLRB and because Member Hirozawa should have been recused. *See infra* and *See generally Patco v FLRA* 685 F2nd 547 (DC Cir, 1982)

If nothing else, there was a dramatic lack of transparency in this matter severely compromising anyone's confidence in the process. This lack of transparency started with the motion to remand where a secret vote was held to authorize it and a determined and marked failure of disclosure to the parties and the Court that continued thereafter. The judicial process must be above reproach in order for there to be confidence in it. This process does not provide such confidence and cannot be relied on. Certainly, the Court cannot grant any deference to the NLRB's decisions on the motions for reconsideration. Thus, the NLRB decisions, for instance, on remand, as to a) whether there was an adequate quorum for the December 31, 2011 decision where Chairman Pearce was recused,

ab initio, and, was therefore made by only two Board members, and b) whether there should have been a hearing before summary judgment was granted, are owed no deference at all.

MEMBER HIROZAWA SHOULD HAVE RECUSED HIMSELF

Firstly, Member Hirozawa, in citing 5 CFR section 2635.502, (SA-24) does not assert that he "ran this by" anyone as mentioned in the regulation. Rather, he has made this determination on his own. It is respectfully submitted that "Example 4", noted in the cited regulation, directly applies to Member Hirozawa, and disqualifies him.

Before being appointed as a Member of the NLRB in August 2013, Member Hirozawa was chief counsel to Chairman Pearce from April 2010 to August 2013. As noted in footnote 4 of the NLRB's December 17, 2015 (SA-17) order in this case, Chairman Pearce has recused himself in the past, and at least from April 20, 2011, in *this* case, from considering New Vista's case. He has also not participated in deciding any of the motions for reconsideration in this case, including the 2015 remand. Member Hirozawa was already *his* chief counsel when Chairman Pearce (first) recused himself in 2011. Until April 2010, both Chairman Pearce and Member Hirozawa had as *their office client* the instant charging party union, 1199 SEIU. However, Member Hirozawa, personally, and his law firm, generally, had long represented the instant *local* union,

1199SEIU/***New Jersey***, in their offices, and his partners had done so *in this case.*

Significantly, Chairman Pearce's *current* Chief Counsel, who took over after Member Hirozawa became a Board Member, Ellen Dichner, Esq. *represented* the instant charging party union, on issues raised in this case, before the Board *in this very case*. At the time that he left to work at the Board, Member Hirozawa *was a partner* of Ms. Dichner's at Gladstein, Reif and McGinnis.1 Since he was at the *Gladstein* firm for over twenty years before joining the Board, litigation by him and his partners concerning *New Vista* was ongoing in his office. In *this* case, when the instant union client, and Member Hirozawa's law firm filed, and litigated, the election petition and conducted hearings on issues like the supervisory status of the Licensed Practical Nurses ("LPN"s), he states that he left 8 months earlier. Member Hirozawa finds it acceptable to judge cases that his partner William Massey, Esq., has been litigating since 2011,before him. That case started, at most, several months after Member Hirozawa states that he left the firm. The election petition in this case was filed *January 25, 2011, less than a year after Member Hirozawa staes that he left the firm.* Thus, Member Hirozawa was formerly a partner in the firm where *this* charging party "client" filed charges against *this very* Respondent, *and his partners* litigated the case upon those charges (filed in May 2011). That was only one year after his

[1] The firm's website refers to *nine* attorneys on a *single* floor in New York City.

departure from the firm. Chairman Pearce's office, by contrast, was uninvolved in any of the litigation, in particular, did not represent the New Jersey region, in general, and still recused himself.

Member Hirozawa joined the Board as a member, after acting as Chairman Pearce's chief counsel since 2010, in July 2013. It is hard to see his rationale for compliance with the Executive Order that he cites. That Order states, *inter alia*, a commitment that;

> I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related *to my former employer or former clients*, including regulations and contracts.

Aside from any legal arguments by Member Hirozawa, and any hyper technical compliance with them, no reasonable person with knowledge of these facts would fail to question Member Hirozawa's impartiality in judging this matter. His partners, some of twenty years, were litigating their firm's cases on behalf of clients that he represented for years, before him. Member Pearce, who was steps further removed, saw that this was not viable. And yet, he was not a member of the *Gladstein* firm! Member Hirozawa was.2 While Chairman Pearce

[2]Member Hirozawa does not contest that the union in this case was a long time important client in his office or even *that he did not personally and actively represent them over many years in many cases*. He merely asserts that he was not actually litigating *this* case on their behalf.

represented the union, his office never represented *this* client in *this* case. Member Hirozawa's did. This is especially compounded now that we know that Member Hirozawa, without disclosure, participated in the vote to move to remand this case to him.

The Board denied reconsideration without commenting on why it found Member Hirozawa's participating on the panel acceptable. Thus this reviewing court has nothing except Member Hirozawa's comments upon which to assess whether Member Hirozawa should have been recused or not. Of course, *post hoc* rationalizations cannot be provided by Board counsel in their briefs. *SEC v Chenery* 332 U.S. 194. (1947) ("The short -- and sufficient -- answer to petitioners' submission is that the courts may not accept appellate counsel's post hoc rationalizations for agency action." *Motor Veh. Mfrs. Ass'n v State Farm Mut. Auto. Ins. Co.*, 463 US 29, 50 [1983].)

The consequences of Member Hirozawa improperly participating in this matter are stark. If this court finds that Member Hirozawa could not participate in the Board's decision, the entire decision becomes unenforceable and it will not permit enforcing the decision by the remaining two Board members. *Berkshire Employees Ass'n v. NLRB*, 121 F.2d 235 (3d Cir. 1941) By contrast, there would be very little difficulty in having another Board member be part of a three member panel to review this case. Moreover, as Member Hirozawa could not lawfully be

on the panel *ab initio* there was no valid quorum to hear the case. (*NLRB v Noel Canning*, ___US___, 134 SCt 2550 [2014], 573 US __ (2014) , *NLRB v New Process Steel* 130 S.Ct. 2635, 560 US 674 (2010))

As it is clear that Member Hirozawa should not have been on the panel reviewing this case, the court's desire in the remand that the matters be decided by a lawful quorum of the NLRB has not been fulfilled and it should deny enforcement of the order.

CONCLUSION

The Court should deny enforcement of the NLRB's order.

Dated: February 22, 2016

Respectfully Submitted,

s/ Morris Tuchman
Morris Tuchman, Esq.

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify to be counsel for Respondent, New Vista Nursing and Rehabilitation, I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

Dated: February 22, 2016

s/ Morris Tuchman
Morris Tuchman, Esq.

CERTIFICATE OF WORD COUNT

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing brief contains __2,352__ words, excluding the parts of the brief exempted by Fed. R. App. R. 32(a)(7)(B)(iii).

Dated: February 22, 2016

s/ Morris Tuchman
Morris Tuchman, Esq.

CERTIFICATE OF IDENTICAL BRIEFS, APPENDIX AND VIRUS SCAN

I hereby certify that the text of Respondent's E-Brief and Supplemental Appendix PDF form and the paper copies are identical. I further certify that the E-Brief and Supplemental Appendix were scanned for viruses using ESET NOD32 Antivirus 4, and that no viruses were detected.

Dated: February 22, 2016

s/ Morris Tuchman
Morris Tuchman, Esq.

CERTIFICATION OF SERVICE

I, Morris Tuchman, hereby certify that on this date, I caused an Adobe PDF file containing the foregoing Brief and Supplemental Appendix on behalf of Respondent to be filed with the Clerk of the Court using CM/ECF and, as such, the Brief and Supplemental Appendix were served electronically upon all counsel of record.

I further certify that on this date, I caused the hard copies of the Respondent's Brief and Supplemental Appendix to be properly served on the Court by UPS service for next-day delivery.

Dated: February 22, 2016

s/ Morris Tuchman
Morris Tuchman, Esq.